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In The

Supreme Court of the United States

ED BROWN, *et al.*,

Petitioners,

v.

JAMES S. GILMORE, III, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This supplemental brief is filed by the Attorney General of Virginia on behalf of all respondents (collectively, "the Commonwealth") in response to new matters appearing in the reply brief of petitioners.

ARGUMENT

a. In a new argument, petitioners misquote *Edwards v. Aguillard*, 482 U.S. 578 (1987). In *Edwards*, the Court discounted the post-enactment testimony of certain experts and, in so doing, stressed that "none of the persons making the affidavits produced by [Louisiana] participated in or contributed to the enactment of the law *or its implementation*." *Id.* at 595-96 (emphasis added). In quoting this passage, petitioners chop off the last three words. *See* Reply Brief of Petitioners ("Reply Br.") at 3. The omission is significant because much of the expert testimony relating to secular purposes was provided by Dr. Jo Lynn DeMary, the State Superintendent of Public Instruction, whose role in implementing the Act is uncontroverted. *See* Brief in Opposition ("Br. Opp."), Statement of the Case, ¶¶ 3, 5, 7a, 9 and 15.

Petitioners' omission is part of their larger failure to recognize what *Edwards* says about the sources to be examined in discerning legislative purpose. Even in a facial challenge, those sources include "interpretation by a responsible administrative agency." 482 U.S. at 594. Here, the responsible administrative agencies include not only the State Superintendent, but also the State Board of

Education that promulgated the guidelines reflecting the secular purposes of the Act. *See* Br. Opp. at 5. Petitioners' objections to the Commonwealth's evidence are unfounded.

b. Unlike the original petition, the reply brief clearly shows that petitioners are counting on the admissibility of newspaper articles allegedly providing evidence of impermissible legislative purpose. *See* Reply Br. at 3, n.3. (At the same time, petitioners fail to identify what statements in the articles they want the Court to consider.) Thus, while their "question presented" addresses only the application of *Wallace*, this case is likely to involve extraneous issues about the rules of evidence and the scope of relevant "legislative history." *See* Rule 14.1(a).

Petitioners argue that the Court should consider such newspaper articles based on the authority of *May v. Cooperman*, 780 F.2d 240 (3rd Cir. 1985). But a single circuit court opinion is a very frail reed on which to base certiorari. Moreover, not even *May* says what petitioners want it to say. In *May*, the Third Circuit discussed – but did not rule on – the hearsay objection, saying that the appeal did not turn on that issue, and that the district court's findings would have been the same whether or not the clippings were excluded. *Id.* at 252, n.9.[1]

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[1] Nor can petitioners take comfort in the decision of the *May* district court that allowed the disputed newspaper articles into evidence. The district court did so largely because "[t]he New Jersey legislature does not preserve an official record of its hearings and debates." *May v. Cooperman*, 572 F. Supp. 1561, 1564 (D.N.J. 1985). In Virginia, unlike New Jersey, transcripts of

Petitioners' desire to draw this Court into a long and unavailing evidentiary excursion again shows that this case is very fact-specific and that certiorari is ill-advised.

c. Petitioners also misquote *Wallace* – albeit in an indirect quotation – when they say that "the *Wallace* majority . . . unambiguously stated that, by *including* the word 'pray' in a minute of silence statute, 'the State intended to characterize prayer as a favored practice.' " Reply Br. at 9 (emphasis added), citing *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985). The Court never said that "including" the word prayer was a problem. The Court referred instead to the "addition" of that word to a pre-existing legislative scheme that *already* secured the right to pray during an appropriate minute of silence. 472 U.S. at 59. By contrast, before the 2000 amendment, the Virginia Act did not secure that right for the many students who attended schools where a "local option" minute of silence had never been implemented.[2]

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what was actually said on the floor of the legislature are available, and have been introduced into the record. J.A. 123-71, 314-42, 347-55. Contrary to petitioners' suggestion, there is obviously no need for a litigant to inquire into – much less "contest" – the accuracy of matters that are not properly in evidence.

[2] Petitioners try to refute the Commonwealth's concern about discrimination by noting that there were no problems in connection with the minute of silence in those jurisdictions that implemented it under the pre-2000, local option version of the Act. Reply Br. at 6, n.5. Their argument is a *non sequitur*. The pre-2000 version of the Act – like the current version – contained the word "prayer" and, therefore, served notice that such discrimination was not permitted during a minute of silence. Petitioners fail to explain how such notice would be communicated if the word were to be deleted from the statute.

d. Petitioners' discussion of the word "may" in *Wallace* is based on an incomplete – and highly misleading – quotation of the sentence where this word is used. *See* Reply Br. at 7, 8. The *Wallace* sentence in question reads: "For even though a statute that is motivated in part by a religious purpose may satisfy the first criterion, *the First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion.*" *Wallace*, 472 U.S. at 56 (internal citation omitted) (emphasis added). Petitioners chop off the italicized words where the main point of the sentence is made. *See* Reply Br. at 8. By obscuring both the Court's main point and the sentence structure, petitioners do not allow the word "may" to be read in context. For a word like "may" with multiple meanings, context is important. As one authority notes: "*May* . . . can be used in a discussion rather like *although*: to introduce a fact, when one is going to say that the fact makes no difference to the main argument. . . . [I]n this structure, *may* is often used to talk about things that are definitely true, not just possible." MICHAEL SWANN, PRACTICAL ENGLISH USAGE 327 (Oxford University Press 2d ed., 1995) (1980).[3] The sentence in question from *Wallace* uses just such a structure and appears intended to convey just such a meaning. When "may" is read in the context used by the Court, it carries a meaning of definiteness, not mere possibility, a conclusion consistent

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[3] An example given by this authority illustrates the point. Consider the sentence: "It **may** be a comfortable car, but it uses a lot of petrol." This means: "I *agree* that it is comfortable, but . . . " It does not mean: "There's *a chance* that it is comfortable. . . . " SWANN, *supra*, at 327 (emphasis added).

with *Lynch v. Donnelly*, 465 U.S. 668 (1984). *See* Br. Opp. at 17, 18.

Even if "may" is read as petitioners want it read, their argument shows anew why their case is not worthy of certiorari. They say "the *Wallace* decision recognizes that a statute with mixed legislative motives may or may not satisfy the First Amendment, *depending upon the circumstances* of the case." Reply Br. at 8 (emphasis added). By petitioners' reading of *Wallace*, the decision whether a statute passes the first prong of the *Lemon* test depends on the *specific facts* of the case, without any principle of general application. It is doubtful whether such a highly fact-specific inquiry would be appropriate for certiorari in any case. It is certainly not appropriate here in light of the thorough factual analysis undertaken by the court of appeals. *See* Fourth Cir. Op., Pet. 5a-10a, 14a-17a, 20a-24a.

Petitioners ask the Court to measure secular purpose by developing some sort of new, percentage test not found in *Wallace*. *See* Reply Br. at 7. Even if *Wallace* did not foreclose such a test, it certainly would not require it. Indeed, the holding in *Wallace* is cast in absolute terms, saying that a statute fails the first prong when it has "*no* secular purpose." 472 U.S. at 56 (emphasis added). Since petitioners candidly base their case on a new test not found in *Wallace*, the decision of the court of appeals plainly does not violate the holding of that case. Thus, by their own brief, petitioners disprove the central argument of their petition. Moreover, in order to consider the sort of test sought by petitioners, the Court must step outside petitioners' narrow, *Wallace*-based "question presented." As previously noted, this would violate Rule 14.1(a), a

point that petitioners have not addressed – much less refuted. For these reasons, too, certiorari is inappropriate.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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